KLEIN NOMINATION/Cloture

SUBJECT: **Joel I. Klein, of the District of Columbia, to be Assistant Attorney General for the Antitrust Division, Department of Justice. Nickles motion to close debate.**

ACTION: CLOTURE MOTION AGREED TO, 78-11

SYNOPSIS: Joel I. Klein was born October 25, 1946 in New York City, New York. He received an A.B. degree from Columbia College in 1967 and a J.D. degree from Harvard Law School in 1971. His employment history includes the following: 1971-1972, Research Assistant, Center for the Advanced Study of the Behavior Sciences, Stanford University; 1973-1974, Law Clerk, Chief Judge David L. Bazelon, U.S. Court of Appeals, D.C. Circuit; 1974, Staff Attorney, Mental Health Law Project; 1974-1975, Law Clerk, Justice Lewis F. Powell, U.S. Supreme Court; 1975-1976, Staff Attorney, Mental Health Law Project; 1977-1981, Member, Board of Trustees, The Green Door (a community-based program for former hospitalized psychiatric patients); 1976-1981, Partner & Associate, Rogovin, Stern, & Huge; 1987-1993, Member, Board of Directors, Psychiatrists Mutual Insurance Company; 1988-1993, Adjunct and Visiting Professor, Georgetown University Law Center; 1981-1993, Partner, Klein, Farr, Smith, & Taranto; 1993-present, United States Government, Executive Branch positions (for the past 2 years he has served as Principal Deputy in the Justice Department's Antitrust Division, and for the past several months he has been the Acting Assistant Attorney General for the Antitrust Division).

On July 11, 1997, Senator Nickles sent to the desk, for himself and others, a motion to close debate on the nomination. By unanimous consent, the vote on the cloture motion was scheduled for July 14.

NOTE: A three-fifths majority (60) vote is required to invoke cloture.

Background: In a consent decree referred to as the Modification of Final Judgment (MFJ), AT&T agreed to stop providing local phone services. Its local phone companies were divided into seven Regional Bell Operating Companies, (RBOCs) which are holding companies that contain both Bell Operating Companies (BOCs) and other services. The number of BOCs (approximately 20) are not governed by the consent decree. The decree also created Local Access and Transport Areas (LATAs). There are currently 198

(See other side)

YEAS (78)

Republican (49 or 100%)

Abraham
Allard
Ashcroft
Bond
Brownback
Campbell
Chafee
Coats
Cochran
Collins
Coverdell
Craig
DeWine
Domenici
Enzi
Faircloth
Frist
Gorton
Gramm
Grassley
Gregg
Hagel
Hatch
Helms
Hutchinson
Hutchison
Inhofe
Jeffords
Kempthorne
Kyl
Lott
Lugar
Mack
McCain
McConnell
Murkowski
Nickles
Roberts
Roth
Shelby
Smith, Bob
Smith, Gordon
Snowe
Specter
Stevens
Thomas
Thompson
Thurmond
Warner

Democrats (29 or 73%)

Baucus
Bingaman
Boxer
Breaux
Bryan
Bumpers
Daschle
Durbin
Feinstein
Ford
Glenn
Graham
Inouye
Johnson
Kerry
Kohl
Landrieu
Leahy
Levin
Lieberman
Moseley-Braun
Moynihan
Murray
Reed
Reid
Robb
Rockefeller
Sarbanes
Torricelli

NAYS (11)

Republicans (0 or 0%)

Democrats (11 or 28%)

Akaka
Byrd
Cleland
Conrad
Dorgan
Feingold
Harkin
Hollings
Kerrey
Lautenberg
Wellstone

NOT VOTING (11)

Republicans (6)

Bennett-[2]
Burns-[2]
D'Amato-[2]
Grams-[2]
Santorum-[2]
Sessions-[2]

Democrats (5)

Biden-[2]
Dodd-[2]
Kennedy-[2AY]
Mikulski-[2]
Wyden-[2]

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

LATAs. As the decree originally worked, a BOC could provide phone service within a LATA, but it could not provide phone service across LATA boundaries. The Telecommunications Reform bill (see 104th Congress, 2nd session, vote No. 8) made substantial modifications to the final judgment. Under the new law, a BOC will be permitted to provide interLATA phone service originating in a LATA in which it provides local service under three conditions (see 104th Congress, 1st session, vote Nos. 243 and 250 for related debate): it must meet a list of requirements to make its local services available at wholesale costs to its competitors; the FCC must certify that such service is in the public interest; and the service must be offered (initially) through a subsidiary. Additionally, the FCC will be required to receive and to give substantial weight to the Justice Department's antitrust evaluation of a BOC's application to provide long-distance service before determining if a BOC has met the necessary three conditions, but that evaluation will not have any preclusive effect on any FCC decision. The Senate specifically rejected requiring the use of the "substantial possibility" section VIII(c) test from the MFJ (see 104th Congress, first session, vote No. 250). The explanatory statement accompanying the conference report notes, among other possibilities, that the section VIII(c) test may be used, but the bill language states that "any standard the Attorney General considers appropriate" may be used. Any part of the MFJ not modified or superseded by the Telecommunications Act is administered by the FCC (see 104th Congress, 1st session, vote No. 248). No BOC application to provide interLATA services from a LATA in which it provides local exchange services has been approved to date. The Assistant Attorney General for the Antitrust Division of the Justice Department is the official who will advise the FCC on proposed BOC long distance services from which the BOC provides local exchange services.

Those favoring the motion to invoke cloture contended:

Few subjects are as complex as telecommunications policy, and few subjects on which the Senate makes decisions have as momentous economic consequences as decisions on this policy. The Klein nomination, for reasons which we believe are unfair, has become embroiled in an arcane, grey area of telecommunications law. The Telecommunications Reform Bill that was enacted last Congress sets forth certain conditions that have to be met by Bell Operating Companies (BOCs) before they will be allowed to offer long-distance phone services from areas in which they provide local phone services. Those conditions are intended to make certain that the local phone service areas are open to competition. Congress set those conditions because it did not want to allow BOCs to be able to unfairly use their monopoly status, and profits, from local phone services to gain advantages in providing long-distance services. Without going into too much detail, Congress gave most authority for determining whether BOCs met particular requirements to the Federal Communications Commission (FCC). The Justice Department, however, was also given a role. Before the FCC approves a BOC's request to be allowed to provide long-distance phone services originating from their local exchange areas, it must ask the Justice Department for its evaluation of the request in terms of its effect on competitiveness. Mr. Klein, as acting Assistant Attorney General for Antitrust, is already the official who is responsible for giving the FCC that advice. In a recent speech, he made statements that caused some Senators concern that he would apply a standard that was so strict that BOCs would never be able to enter the long-distance market from their local markets. In his reply to those Senators, he then caused concern among other Senators that he would be too lenient. Those Senators indicated their intention to delay the consideration of this nominee, making it necessary to file cloture.

Our colleagues who oppose this nominee have three major concerns. First, they are upset that he has explicitly rejected using the VIII(c) test (from the AT&T breakup) in deciding if allowing a BOC to enter a long-distance market will hurt competition. Our colleagues intimate that Congress strongly favored the use of that test. However, the truth is that the Senate explicitly rejected requiring the use of that test, and the enacted language explicitly tells the Justice Department to use any test it deems appropriate. Second, our colleagues have complained that he has suggested that one of the local competition requirements could be met if most of the total services being provided by a competitor were being provided with the competitor's own facilities. Our colleagues say that requirement could only be met if both the residential and business services, not the sum of those services, were provided mainly using non-BOC facilities. Rather than debating the merits of our colleagues' argument, we note that they are arguing about only one part of a large test as viewed by the Justice Department, which has only an advisory role. The third concern of our colleagues is that Mr. Klein recently approved the merger of Bell Atlantic and Nynex. Our colleagues opposition to that merger is based solely on a general opposition to mergers of large companies. They have not made any demonstration that this merger of two companies has decreased competition.

Our colleagues, on fairly flimsy evidence, have decided that Mr. Klein is not interested in enforcing antitrust laws. They are basically trying to read the tea leaves. Unfortunately, they are overlooking most of the leaves. In their complaints, they have not mentioned that he has recommended against the only two applications that have come before him for Bell entry into the long-distance market. They also have not mentioned that he has greatly increased enforcement actions against companies for anticompetitive behavior. During his brief tenure as acting head of the Antitrust Division, criminal fines have gone up more than 600 percent. If those of us who are generally against Federal regulation of the marketplace looked at just those actions in isolation, we would be concerned that he was too zealous in his enforcement of the antitrust laws.

However, we understand that this area of the law is just too complex to make that kind of judgment. The Antitrust Division was

created to function as a specialist agency with the expertise and experience essential to making sound antitrust enforcement decisions. Quick, intuitive judgments based upon an incomplete understanding of either the facts or the law can easily lead to incorrect decisions. Critics of Mr. Klein do not have his detailed knowledge of the facts of the cases over which they are criticizing him. Congress wisely entrusted these decisions to an expert agency; it should not criticize it when it is willing to take unpopular stands, such as the approval of the Bell-Nynex merger, that it decides are in the public interest.

Mr. Klein could easily have delayed action on that merger until after he was confirmed, and he could just as easily have put off giving real answers to Senators on his views on BOC entry into the long-distance market. The fact that he did not increases our confidence that he will perform well in this post. He will not put political concerns ahead of the public interest. No Senator, Democrat or Republican, has questioned his qualifications, and he is strongly supported by former heads of the Division, again of both parties. We urge our colleagues to join us in ending the filibuster against this clearly qualified nominee.

Those opposing the motion to invoke cloture contended:

Just 18 months after the enactment of the Telecommunications Reform bill, some critics are already calling it a failure. Their twin criticisms are that it has failed to result in competition in local phone markets and it has resulted in mergers rather than increased competition. When we considered the Act, our two main fears were precisely that the bill would have those results. We voted for it, though, because we thought that competition would be protected by the Justice Department safeguards that we managed to have included. The person at the Justice Department who is primarily responsible for the implementation of the safeguards is the Assistant Attorney General for the Antitrust Division. Mr. Klein has recently been acting in that capacity, and his actions have given us considerable reason for concern. He has contradicted specific statutory mandates and conference report directions designed to ensure that Bell Operating Companies (BOCs) open their markets to competition before they enter the long-distance market or other markets, and he has taken other actions that show a lack of concern for increasing competition in telecommunications. Our first concern is that he has misinterpreted the plain meaning of section 271 of the bill, which states that one of the conditions that must be met before entry is that "the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange services . . . to residential and business subscribers." Mr. Klein has said he believes that if a BOC has a competitor that is exclusively or mainly using BOC facilities to provide either business or residential services, but is using its own facilities for the other services, the condition can still be met as long as most of the services are being provided with the competitor's facilities. That interpretation is clearly wrong, as has been attested to by the provision's author. Our second concern is that he cavalierly, flatly stated that he rejected a proposed competitive review standard that Congress suggested that the Justice Department should use. Congress did not suggest that standard on a whim; it was debated, and the conferees suggested it with the full expectation that the Justice Department would use it or a very similar standard. Mr. Klein said that he thought that the particular proposed standard from the MFJ, which worked so well in opening up the long-distance market to competition, would be too hard for the BOCs to meet. That statement and that action are enough reason for any Senator to refuse to support this nominee. Our final concern is that he recently approved the merger of Bell Atlantic and Nynex without any conditions. He made that decision against the advice of many Antitrust Division officials. Neither company operates in open markets now, so we suppose it does not decrease competition, but it makes future competition less likely, if for no other reason than that these companies could have fought to compete in each others markets. We do not want to see the consolidation of existing companies; we want to see new companies and we want to see existing companies compete.

The BOCs have fought tooth-and-nail to keep their monopolies since passage of the Telecommunications Reform bill. Strategies they have used have included countless delaying lawsuits and overcharging of competitors to use their facilities (one BOC, for instance, charges more for unbundled access per customer than it charges its customers for retail service, thereby making it impossible for anyone to compete with it). Companies like MCI that have tried to enter local phone service markets have so far lost the battle and have lost substantial sums of money. We need an Assistant Attorney General who will fight hard against the monopolistic behavior of the BOCs if the Telecommunications Reform Act is going to have any chance of succeeding. Mr. Klein is obviously not interested in that fight. We therefore strongly urge our colleagues not to vote in favor of cloture on this nominee.